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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

The City of Erie, Pennsylvania, Joyce A. Savocchio, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robison, and James N. Thompson, all in their official capacities,

Petitioners,

vs.

Pap's A.M., t/d/b/a "Kandyland,"

Respondent.

On Writ of Certiorari
To the Supreme Court of Pennsylvania

BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRIMANCE

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STATEMENT OF AMICUS

Amicus Curiae First Amendment Lawyers Association [1] is an Illinois not-for-profit corporation with some 172 members throughout the United States. Its membership consists of attorneys whose legal practices consist in large measure of the defense of First Amendment rights against governmental intrusion. The interest of amicus is that amicus takes the position that the fragmented decision of this Court in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), has created substantial confusion in lower courts throughout the United States as to the permissible extent of government regulation of constitutionally protected speech. Amicus curiae urges this Court to adopt the position that, to the extent that concerns of "order and morality" are a permissible basis for regulation of otherwise constitutionally protected speech, that regulation should be limited to prohibiting the legally obscene pursuant to *Miller v. California*, 413 U.S. 15 (1973) or regulating speech forced upon a captive audience. Moreover, amicus takes the position that to the extent that the doctrine of "secondary effects" can be used to restrict constitutionally protected speech, such doctrine cannot theoretically nor factually support the regulation at issue in the instant case.

1 Counsel for neither party authored the present amicus brief in whole or in part. Richard W. Jacobson of Cannon Falls, Minnesota, has made a financial contribution toward the preparation of the present brief. This disclosure is being made pursuant (6) of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. See Appendix at A.75 - A.77.

SUMMARY OF ARGUMENT

Because the ordinance in the instant case is directed at expression, it is not governed by the plurality opinion in *Barnes v. Glen Theatre, Inc.*, supra, 501 U.S. 560 (1991). To the contrary, any interest in morality cannot justify the suppression of speech unless said speech is obscene under *Miller v. California*, supra, 413 U.S. 15 (1973), or imposed upon a captive audience. To the extent that the Justice Souter's concurring opinion in *Barnes* relies upon a "secondary effects" doctrine to ban nude dancing, such reliance is unjustified, both theoretically under the "secondary effects" decisions of this Court, and factually. As a result, the Supreme Court of Pennsylvania correctly concluded that the restriction at issue in the instant case was an impermissible content-based restriction upon speech and such decision should be affirmed.

ARGUMENT

I. AS A RESTRICTION PLAINLY DIRECTED AT EXPRESSION, THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER THE "ORDER AND MORALITY" THESIS OF THE

PLURALITY OPINION AND SCALIA CONCURRENCE IN *BARNES*.

To be sure, in both the plurality opinion of Chief Justice Rehnquist and the concurring opinion of Justice Scalia in *Barnes*, an Indiana Public Nudity Statute nominally similar to the ordinance at issue in the instant case was upheld, premised upon the governmental interest in order and morality.[2] However, both the plurality opinion of Chief Justice Rehnquist and the Scalia concurrence specifically conditioned upholding the Indiana statute in *Barnes* upon the fact that the regulation in question was a prohibition of public nudity in general, and not a prohibition specifically aimed at expressive conduct such as nude dancing. In his plurality opinion, Chief Justice Rehnquist specifically wrote:

> "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. Id. at 566.

Concerning the legislative history of the Indiana Statute, Justice Rehnquist wrote:

2See plurality opinion:, "[T]he public indecency statute furthers a substantial government interest in protecting order and morality. " 501 U.S. at 569. See also concurring opinion of Justice Scalia, justifying the ordinance because public nudity is 'contra bons mores,' i.e., immoral." Id. at 575, Scalia, J., concurring.

> "This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition." Id. at 568.

From the history and language of the statute, Justice Rehnquist concluded:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity." Id. at 571.

Likewise, in his concurring opinion, Justice Scalia examined the same statutory language and legislative history and concluded that the statute was not aimed at expressive conduct, but intimated that even if it were selectively applied only to expressive conduct, the First Amendment would be violated. Justice Scalia stated:

> "Indiana's first public nudity statute, [Citation omitted.], predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all of the succeeding statutes, down to the present one

have been the same. Were it the case that Indiana in practice (emphasis by Justice Scalia) targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools [Citation omitted.], it might be said that what posed as a regulation of conduct in general was in reality a regulation of only expressive conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. [Citations omitted.]" Id. 573-574, Scalia, J., concurring.

By contrast, the record in the instant case is indisputable that, far from being a general prohibition of nudity which long predated nude dance entertainment, the express justification of the ordinance in the instant case, on its face, is suppression of nude dance expression. The ordinance specifically repealed a long-standing prohibition on public indecency and immorality, and set forth the following justification for the ordinance:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre, Inc., et al,* 111 Sup. Ct. (sic) 2456 (1991) for the purpose of limiting a recent increase in nude live entertainment within the city (emphasis supplied), which activity adversely impacts and threatens to impact the

> public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." Appendix to Petition for Writ of Certiorari, at 7a.

Moreover, the legislative history as reflected in transcription of the videotape of the Erie City Council, plainly supports the proposition that content-based censorship of expression was the genesis of this particular ordinance. For example, Council Member Thomson, in describing nude dance entertainment, states, "It is live pornography. It is not acceptable in this city, has never been and never will be." Joint Appendix at 40. Council Member Brabender, in support of the ordinance asserted that 18-year old persons were "not allowed to drink at 18 years of age, but they can frequent some of these clubs along with them. I don't know if that's a real wholesome atmosphere." Id. at 42. Council Member Brzezinski plainly asserted that the issue was not about public nudity, but of closing down nude dance establishments, asserting:

> "But we're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which - or three, all three, will be shut down in one form or another until they figure out another way to get around it and do it again." Id. at 45.

Because the record plainly indicates that the ordinance in the instant case was not adopted as a general prohibition against nudity, but rather, on its face, plainly targeted protected expression, it is clear that neither the "order and morality" analyses of the plurality opinion nor the Scalia concurrence is applicable. Quite to the contrary, this Court has repeatedly held that moral objections cannot be the basis for restricting otherwise constitutionally protected expression. As this Court noted in *Texas v. Johnson*, 491 U.S. 397, 414 (1989) "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[3]

The only exceptions this Court has made in this regard are for legal obscenity, under *Miller v. California*, supra, 413 U.S. 15 (1973), and for captive audiences. Neither exception is applicable here.

The ordinance plainly goes far beyond the prohibition of *Miller* obscenity, in that the ordinance is plainly not limited to specifically defined sexual conduct found to be patently offensive to the average person applying contemporary community standards, no requirement that the work taken as a

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3In this regard, see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

whole appeal to a prurient interest in sex, and contains no exception for performances of serious literary, artistic, political or scientific value.

Moreover, as far as a captive audience is concerned, this Court has repeatedly held that if an audience can avoid viewing, seeing or reading material it deems to be morally offensive, it is not "captive" for First Amendment purposes. See *Cohen v. California*, 403 U.S. 15 (1971); *Spence v. Washington*, 402 U.S. 405, 412 (1972); and *Erznoznik v. City of Jacksonville*, 422 U..S. 205 (1975). In *Erznoznik*, this Court specifically rejected a "captive audience" theory in a case involving the public display of nudity in drive-in motion picture theaters, this Court stating that anyone offended "can readily avert his eyes." Id. at 211.

Obviously, there is clearly no issue of a captive audience in this case. The only way a customer can view nude dance performance in Respondent's establishment is to pay admission to enter voluntarily. The audience is not even arguably "captive," as this Court has defined the term.

As a result, since the ordinance is facially directed at expression, and since the ordinance is not restricted to performances which are legally obscene or forced upon a captive audience, any attempt to justify the ordinance on the

basis of order or morality would render the ordinance unconstitutionally overbroad under the First Amendment. See *Erznoznik*, supra.[4]

II. THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER A "SECONDARY EFFECTS" THEORY.

A. THE "SECONDARY EFFECTS" THEORY OF JUSTICE SOUTER IS INCONSISTENT WITH THIS COURT'S HISTORICAL TREATMENT OF THE "SECONDARY EFFECTS" EXCEPTION TO THE PROHIBITION OF CONTENT-BASED DISCRIMINATION.

The use by Justice Souter of a "secondary effects" justification to support the requirement of furthering a substantial governmental interest in *Barnes*, has fostered wholesale confusion in the Circuit Courts as to the requisite

4In this regard, it should be noted that in *Barnes*, there was no facial overbreadth issue, since the Seventh Circuit had held the facial overbreadth issue to have been resolved in a prior state court proceeding. See 501 U.S. at 564, n.1. See also the concurring opinion of Justice Souter, Id. at 585, n.2 in which Justice Souter specifically notes that there was no facial overbreadth challenge before the Court in *Barnes* and strongly suggests that a facial overbreadth challenge might be sustained to legislation similar to the Indiana statute. Indeed, numerous courts have persuasively sustained overbreadth challenges to ordinances indistinguishable from the ordinance in the instant case, based upon facial overbreadth. See for example, *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W. 2d 156 (1998), cert. denied, ___U.S.___, 119 S. Ct. 511 (1998); and *Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128 (W.D. Wis. 1998).

proof and application of "secondary effects." Prior to Souter's concurrence in *Barnes*, secondary effects were seen as harmful effects to the surrounding neighborhood of certain adult businesses, which effects justified the dispersal of those businesses from residential neighborhoods and other protected uses. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Restricting a location of an adult business based on secondary effects does not deny access to protected expression such as nude dancing, because the venues to view the entertainment are still allowed, such restrictions only remove adult uses from the proximity to protected uses and even to other adult businesses.

The "secondary effects" doctrine is properly applied in the context of a time, place, or manner regulation which does not ban or deny access to expression. Because reasonable restrictions on the location of adult expression do not target the message for suppression, this Court has treated such restrictions as content neutral for consideration under the First Amendment. Similarly, identical restrictions on expression which is not the target of a governmental regulation are analyzed by the Court under the four-part formula of *United States v. O'Brien*, 391 U.S. 369 (1968).

The conceptual difficulty arises when *Renton's*

"secondary effects" justification is taken out of the time, place, and manner zoning context, and applied to prohibit conduct protected as expression. In that case, it is obvious that the particular "secondary effects" must shift from the concerns of protected uses to problems which occur where the expressive conduct is taking place. The effects on a particular neighborhood use are no longer relevant because the prohibition will prevent the use anywhere in the jurisdiction imposing the ban. Justice Souter's concurrence in *Barnes* indicates that what he means by secondary effects include prostitution, sexual assault, and associated crimes. *Barnes*, supra, 501 U.S. at 584. Souter J. concurring. Justice Souter's choice of examples refer to crime inside a nude dance and massage business. *U.S. v. Doerr*, 886 F. 2d 947, 949-950 (7th Cir. 1989); *U.S. Marron*, 890 F. 2d 924, 926 (7th cir. 1989). The fact that prostitution occurred at nightclubs that featured nude dancing was sufficient for him to uphold a ban on public nudity as applied to nude dancing. Candidly, Justice Souter recognized that the "secondary effects" he identified were not likely to be present at mainstream theater presentations which also featured nude performance. *Barnes*, supra 505 U.S. at 584, Souter, J. concurring.

The easy criticism of Justice Souter's use of "secondary

effects" to justify a ban encompassing nude performances is that when the concept of secondary effects changes from neighborhood impacts to violations occurring inside the business premise, the proof that most or many businesses that feature nude dancing have prostitution is never documented. No police or planning study is offered to show that what occurred in the nightclub examples Justice Souter cited are widespread, so that prostitution is linked to nude dance performances that regularly occur in "Renton type" nightclubs across the country. Justice Souter is making the unproven leap that, for example, because an adult bookstore had prostitution on the premises as in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), many or all adult bookstores have prostitution on the premises because they sell adult movies.[5] The occurrence of prostitution at a few adult bookstores to justify a ban on businesses that sell adult videos is clearly the same as using "secondary effects" to prohibit the retail marketing of adult motion pictures. Expression is to be denied at properly run adult businesses because a few violators allow criminal activities. With Justice Souter's use of secondary effects, protected expression is suppressed although law enforcement, licensing

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5As will be pointed out in the following section of the brief, the factual premises of Justice Souter's concurrence are not empirically justified.

and manner restrictions would no doubt alleviate the identified internal effects. "At least in *Renton* there was a plausible argument that the secondary effects sought to be regulated - the social decay of neighborhoods - could not be directly regulated in the way that congestion, visual clutter, or violence can be." *Boos v. Barry*, 485 U.S. 312, 337 (1988), Brennan, J. concurring. Justice Souter's "secondary effects" can be directly regulated and do not justify suppressing expression.

Indeed, to the extent that Justice Souter concludes that secondary effects can theoretically justify, not only locational restriction on nude dancing, but a total ban on nude dancing, it is directly contrary to the decision of this court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), when this Court reached exactly the opposite conclusion on the identical issue.

The Circuit Courts, in light of Justice Souter's concurrence in *Barnes* have repeatedly confused the nature and scope of a secondary effects, and, as alarmingly, the evidence required to be compiled by the legislative body to employ a secondary effects justification. In *Triplette Grille, Inc. v. City of Akron*, supra, 40 F. 3d 129, 135 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit reversed a District court's determination based on Justice Souter's requirement that a ban on nudity as applied to nude dancing must be based on a

secondary effects justification. "By requiring affirmative evidence of a secondary effects motivation, the District Court imposed a burden on the city that Justice Souter's opinion seems designed to avoid." See also *D.L.S. Inc. v City of Chattanooga*, 107 F. 3d 403, 410-411 (6th Cir. 1997). In response to the nightclub's argument that the legislature, under prior Sixth Circuit authority, must show that the llegisltature actually relied on evidence of secondary effects, the Court of Appeals replied that the precedent had been altered by controlling Supreme Court precedent, that is, Justice Souter's concurrence in *Barnes*. See also, *Farkas v. Miller*, 151 F. 3d 900 (8th Cir. 1998).

By contrast, the Fifth Circuit has adhered to *Renton's* requirement of evidence which reasonably (objectively) supports a legislative finding that a nude dance encompassing ban is justified through focus on secondary effects. *J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F. 3d 362 (5th Cir. 1998).

However, the Fifth Circuit in *J&B Entertainment* followed the Third Circuit in requiring only that a legislative record be compiled or that the governing body introduce evidence of a secondary effect concen in defense of an ordinance challenge. See *Phillips v. Borough of Keyport*, 107

F. 3d 164, 174-175 (3d Cir. 1997). The Fifth Circuit precedent prior to *J&B* did not allow the after-the-fact secondary effects proof. *SDJ, Inc. v. City of Houston*, 831 F. 2d 1268, 1274 (5th Cir. 1988). The change by allowing the defense to an ordinance challenge to articulate the "secondary effects" justification stems from Justice Souter's obviating the need for a legislative record to find a secondary effects jsutification as a current governmental interest. (*Barnes*, supra, 501 U.S. at 582, Souter, J. concurring). The flaw in the after-the-fact governmental justification is that pretext can be masked by evidence that does not change the fact that a legislative body was predominantly concerned with suppressing message or the content of expression at the time a regulation was enacted. This is the same problem that occurs when a discriminatory firing is sought to be justified by evidence later discovered that would have justified the otherwise illegal termination. Compare *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). What has been lost through the extension of a "secondary effects" justification from the zoning context to the indirect prohibition of nude dance expression is any mechanism to prevent governmental bodies from concocting a record, even though the true governmental purpose is to ban erotic dance due to societal distaste for this form of entertainment. What is

to prevent the government from using biased studies to suggest a governmental justification that was not remotely considered by the legislative body? Would the courts not be unable to question the "studies showing secondary effects" because the truth of the studies is not for the courts?

Indeed, in a total perversion of a "secondary effects" doctrine, the Seventh Circuit has now held that "objective truth" is irrelevant and that regulations may be imposed upon adult entertainment establishments, even when the undisputed evidence before the Court indicates that such establishment causes no adverse secondary effects. See the unpublished opinion in *DiMa Corp. v. Town of Hallie*, 185 F. 3d 823 (7th Cir. 1999), 1999 U.S. App. LEXIS 20301.[6]

B. THE "SECONDARY EFFECTS JUSTIFICATION IS NOT FACTUALLY JUSTIFIED.

1. AVAILABLE EVIDENCE DOES NOT JUSTIFY ANY FINDING THAT NUDE DANCE ENTERTAINMENT CAUSES ADVERSE SECONDARY EFFECTS.

6The Supreme Court of South Carolina has reached a similar amazing result, holding adult entertainment businesses to be subject to regulations closing them down at existing locations, notwithstanding an undisputed record of no secondary effects having been caused. See *Restaurant Row Associates v. Horry County*, 516 S.E. 2d 442 (S.C. May 17, 1999), petition for cert. pending.

In advancing the "secondary effects justification for Indiana's proscription of public nudity in *Barnes*, Justice Souter admittedly did so without any evidence in the record suggesting that nude dancing per se causes such adverse secondary effects, nor even that the Indiana legislature in fact relied on such a "secondary effects" justification in enacting the statute.[7] In justification of that position, Justice Souter stated:

> "The type of entertainment Respondents seek to provide is plainly of the same character as that at issue in *Renton*, [*Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976)], and [*California v. LaRue*, 409 U.S. 109 (1972)]. It is therefore no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, e.g., *United States v. Marron*, 890 F. 2d 924, 926 (7th Cir. 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr*, 886 F. 2d 944, 949 (7th Cir. 1989) (same). In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of a type offered at the Kitty Kat Lounge and the Glen Theatres 'bookstore' furthers its interest in preventing prostitution, sexual assault and associated crime." 501 U.S. at 584, Souter J., concurring.

To begin with, both of the reported Seventh Circuit cases relied upon by Justice Souter, to-wit: *United States v. Marron*, supra, 890 F. 2d 924 (7th Cir. 1989), and *United States v. Doerr*, supra, 886 F. 2d 944 (7th Cir. 1989), involved an F.B.I. sting operation known as "operation safe bet," in which the F.B.I. operated a credit card service and investigated various businesses offering prostitution service on credit cards, three of which involved nude dance clubs. However, the fact that prostitution was found to have occurred at three nude dance clubs, subject to a sting operation no more implies that nude dance clubs are loci of prostitution any more than the fact that prostitution arrests occur at any of a number of locations including a Ford Motor Company plant, a convenience store, motels, school parking lots and numerous private residences in

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7See 501 U.S. at 582, Souter J. concurring, stating that the Court's appropriate focus was "not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." This is clearly contrary to the position adopted subsequently by this Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996), in which it stated that governmental justifications "must genuine, not hypothesized or invented post hoc in response to litigation."

all kinds of neighborhoods.[8]

Moreover, Justice Souter's opinion, in essence amounts to the Court taking judicial notice of the supposed "fact" that nude dance entertainment necessarily results in adverse secondary effects. There are essentially two problems with such use of judicial notice. First of all, judicial notice should only be applied to adjudicative facts, not legislative facts. See Fed. R. Evid. 201(a). More significantly, Fed. R. Evid. 201(b) specifically provides as follows:

> "A judicially noticed fact must be one not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The notion that nude dance entertainment causes adverse secondary effects satisfies neither of the foregoing tests of judicial notice. See the paper prepared by Dr. Daniel Linz of the University of California Santa Barbara, set forth in the Appendix at A.1-A.58. In that paper Dr. Linz specifically reviews the major so-called "studies" which purport to link

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8Set forth in the Appendix at A.72-A.74 is a compendium of published reports of various loci of prostitution, setting forth all of the foregoing as places in which prostitution has occurred.

adult entertainment an adverse secondary effects, such as an increase in crime and a decline in property values. As noted by Dr. Linz absolutely none of the studies that purport to find such a connection have been conducted with methodology sound enough even to satisfy the minimal requirements of reliability for admission into evidence, pursuant to this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. Ltd., v. Charmichael*, ___U.S.___, 119 S. Ct. 1167 (May 23, 1999). Deficiencies in these studies include the use of subjective survey data when more reliable empirical evidence is available; failure to follow methodologically sound practices in selecting control areas; and use of survey techniques designed to distort and bias the surveys findings.[9]

Perhaps even more significantly, available evidence plainly suggests that where studies of the relationship between adult entertainment and secondary effects have been done in a scientifically sound manner, no relationship has been found to exist. See for example, the discussion of the April, 1978 study in St. Paul, Minnesota, in which the presence of "adult entertainment" and secondary effects, such as a decline in

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9See appendix at A.14 - A.27. See also Table 2 at A.58.

property values, and an increase in criminal activity, were compared for various census tracts throughout the city in 1970 and 1976. While the study found a positive relationship between the presence of "adult entertainment" and the above-mentioned adverse secondary effects, the study took pains to note that the term "adult entertainment" had been defined to include both sexually oriented businesses and alcohol-serving businesses. However, when sexually oriented businesses were studied, no relationship existed, either in 1970 or 1976, between the presence of sexually oriented businesses and an increase in crime or a decline in property values. See Appendix at A.13-A.14.[10]

Finally, Dr. Linz notes that even those studies frequently

10See also the study conducted by the police department in Fulton County, Georgia, excerpts of which are set forth in the Appendix at A.59-A.71, in which the county, in a deliberate attempt to justify restrictions on nudity in establishments licensed to sell alcohol, directed its police department to compare crime statistics between alcohol-serving establishments with or without nude dance entertainment. Much to the chagrin of the County Board, the police department reported back that not only did alcohol-serving establishments with nude dance activity not have more police calls and more reports of criminal activity, they had substantially fewer such reports. The Fulton County police reluctantly concluded that "there is no statistical correlation that shows an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate there is a greater instances (sic) of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages." Appendix at A.71.

cited as proof for the connection between adult entertainment businesses and adverse secondary effects in fact demonstrate exactly the opposite conclusion, in those portions of the studies done in compliance with the principals mandated by this Court in *Daubert* and *Kumho Tires*. For example, in the Los Angeles study of property values, at least two study areas (areas containing adult businesses) had property values decline at a lesser rate or increase at a greater rate than comparable areas without adult entertainment businesses. This led the researchers to conclude that there is "insufficient evidence to support the contention that concentration of sex oriented businesses have been the primary cause of these patterns of changes in assessed evaluations between 1970 and 1976." Appendix at. A.16. Similarly, in the Indianapolis study again frequently cited as demonstrating a relationship between adult entertainment businesses and crime, the sub-area analysis, involving crime rates within 1,000 feet of adult entertainment businesses, as compared to those within a 1,000 foot radius of a random centroid in the control areas, revealed a greater rate of increase in crime in the control areas than in the areas around the adult entertainment business. Id. at A.23-A.24.

In the early years of this millennium, we all knew that the sun revolved around the earth, and that if one sailed to the

horizon, one would fall off the edge of planet. We changed our mind about those positions when we examined the facts, which disproved our earlier determination.

This Court has had the identical experience. Last century, this Court knew that separate but equal was in full compliance with the United States Constitution. *Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court changed its mind when it objectively looked at that facts and realized that its earlier determination was based upon a flawed view of the facts. See *Brown v. Board of Education*, 347 U.S. 483 (1954). This case presents the identical situation. The Souter concurrence in *Barnes* suggests that we "know" that adult entertainment causes adverse secondary effects. As the appendices to this brief indicate, objectively verifiable facts do not support this clearly erroneous position, and this Court must be willing to reevaluate the issue and render a decision based upon facts, not fantasy.[11]

2. EVEN ASSUMING THE EVIDENCE SUPPORTED THE PROPOSITION THAT ADULT BUSINESSES CAUSE ADVERSE SECONDARY EFFECTS, THERE IS NO EVIDENCE PROHIBITIONS OF PUBLIC NUDITY WOULD SIGNIFICANTLY ADVANCE THE GOVERNMENT'S INTEREST IN

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11 The only alternative is to adopt the clearly absurd position of the Seventh Circuit that "objective truth" is irrelevant, a position clearly contrary to this Court's holding in *U.S. v. Carolene Products, Co.*, 304 U.S. 144 (1938).

CURBING SUCH EFFECTS.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), this Court applied a test for regulating commercial speech, a test extremely similar to the test for regulating conduct containing a speech component or a time, place, and manner regulation of speech.[12] In that case, this Court noted:

> "In *Edenfield [v. Fane*, 507 U.S. 761 (1993)], we decided that the Government carries the burden of showing that the challenged regulation advances the government's interest 'in a direct and a material way' [Citation omitted.] That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain such a restriction commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' [Citation omitted.] We caution that this requirement was critical; otherwise 'a State could with ease restrict commercial speech in the service of other objectives that could not

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12 Compare the tests for regulating commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980), the test for incidental regulation of speech under *O'Brien*, supra, 391 U.S. 367 (1968), and the test for time, place and manner regulation of speech contained in *Renton*, supra, 475 U.S. 41, and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), plainly indicates the test to be extremely similar. Indeed, in *Clark v. Community for Creative Non-Violence*, 458 U.S. 288 (1984), this Court indicated that the *O'Brien* test is "in the last analysis, little, if any, different from the standard applied to time, place or manner restrictions."

themselves justify a burden on commercial expression.'[13]

Neither the record in this case nor any stretch of logic can conceivably yield the conclusion that the prescribed remedy in this ordinance, to-wit: the requirement of pasties and G-strings or some other measure of clothing, will advance the state's interest in preventing criminal activity or a decline in property values at all, much less ameliorate those secondary effects "in a direct and material way," as this Court's decisions have plainly mandated. Several courts which have attempted a serious analysis of this Court's opinion in *Barnes* have clearly reached this unavoidable conclusion. In *Nakotomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997), in discussing the furtherance of the governmental interest, the court in that case noted:

> "Moreover, to pass constitutional muster under *O'Brien*, which Justice Souter acknowledges articulates the appropriate test, Indiana's statute, requiring that erotic dancers wear pasties and G-strings, must somehow further Indiana's interest in reducing prostitution and drug use (emphasis by the court). To-wit:

13More recently, in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), both the plurality opinion and the plurality opinion of Justice O'Connor emphasized the exacting scrutiny to which the remedy of a restriction on commercial speech would be placed.

> Indiana must demonstrate that its regulatory scheme, at minimum, makes sense based on the objectives to be obtained. This is not to say that a governmental entity must isolate the precise causes of the correlation between the regulated activity and the detrimental secondary effect. However, where government is seeking to restrain the free expression of its citizens, the Supreme Court has invariably held that the burden falls on the government to justify the infringement. [Citations omitted.]
>
> Recognizing this important requirement, the plurality in *Barnes* was careful to note that Indiana's interest in order and morality was furthered by directly banning the 'evil' itself: nudity. [Emphasis by the court, citation omitted.] In comparison, the 'evil' that Justice Souter addresses is 'prostitution, sexual assault, and other criminal activity.' [Citation omitted.] Clearly, the government has the power to ban prostitution, drug use, and sexual assault. Indeed, better enforcement of existing laws against prostitution and drug use will undoubtedly further the government's interest in reducing these activities. However, if the government seeks to indirectly address these same evils by requiring that dancers engaged in expressive First Amendment activity wear pasties and G-strings, the Constitution requires that there be some connection between the restriction and the evil sought to be eradicated (emphasis by the court)." Id. at 996-997.

The court then concludes:

"In Justice Souter's concurring opinion in *Barnes*, there is simply no mention of how Indiana's indecency statute, requiring that erotic dancers partially cover their breasts and buttocks, will reduce the incidents of prostitution, drug use, and sexual assault. This oversight is most likely due to the fact, that this Court has found here, that no logical relationship exists between the percent of a woman's breast that is visible (in *Barnes* Indiana simply required the covering of the nipple) and the number of prostitutes operating outside an adult establishment." Id. at 997-998.[14]

Most recently, in *Diva's, Inc. v. City of Bangor*, 21 F. Supp. 2d 60 (D. Me. 1998), the court issued both a preliminary and permanent injunction against the enforcement of a municipal ordinance prohibiting the owner of a commercial establishment offering nude dancing from also operating an escort service, dating service, or booking agency within the county. The court enjoined enforcement of the ordinance, inter alia because of the absence of any showing that the goal of reducing crime and prostitution would be at all furthered by

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14Several other courts have precisively reached the same conclusion. See for example, *Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12-13 (S.D. Miss. 1994), and *Books, Inc. v. Pottawattamie County, Ia.*, 978 F. Supp. 1247 (S.D. Ia. 1997).

prohibiting the owner of nude dancing establishments from also operating booking agencies. The court noted:

> "The City claims that it is entitled to rely on studies from other cities to support its action, and points to the legislative record which contains studies conducted in Texas, New York, Minnesota and other states. The Court agrees that the City may base its action, at least in part, on evidence from other communities [Citation omitted.] The studies relied upon by the city here, however, do not address the connection between co-ownership of a booking agency and a nude dancing establishment and prostitution. Rather, these studies support no more than the proposition that nude dancing establishments alone may be associated with certain crimes, including prostitution. Furthermore, these studies focus only on the efficacy of land use and zoning schemes in reducing crime. None documents, or even mentions, the efficacy of an ordinance of the type enacted by the City of Bangor in reducing prostitution or any other crime." Id. at 65.

Consequently, even assuming the reliability of the studies set forth in the Linz paper, at best those studies would support locational zoning restrictions on adult entertainment establishments. Nothing in those studies, none of which were apparently relied upon by the City of Erie in enacting the present ordinance, even remotely suggests that the incidence of prostitution and drug use in adult entertainment establishments

would be even remotely affected by the percentage of a dancer's breast and buttocks subject to covering.

CONCLUSION

Because the ordinance in the instant case was not enacted as a general ban on nudity, but rather was expressly enacted for the purpose of curtailing nude dancing, recognized by this Court to be within the perimeters of the First Amendment, it cannot be justified on the statute's interest in "order and morality." Because secondary effects have only been used to justify time, place, and manner regulations of protected speech and not a total ban on such speech, because the evidence supporting such secondary effects is either unreliable or does not support the proposition that adult entertainment causes adverse secondary effects, and because there has been no showing that the chosen remedy, a prohibition on nude dancing, will advance the government's interest in preventing secondary effects in a direct and material way, it is clear that the Supreme Court of Pennsylvania was absolutely correct when it declared:

> "[T]he Ordinance is inextricably linked with the content motivation to suppress the expressive nature of nude dancing." *Pap's A.M. v. City of Erie*, 719 A. 2d 273, 279 (Pa. 1988).

Because neither Petitioner nor the amici in support of reversal have offered any compelling evidence to support a

content-based restriction which this ordinance plainly is, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

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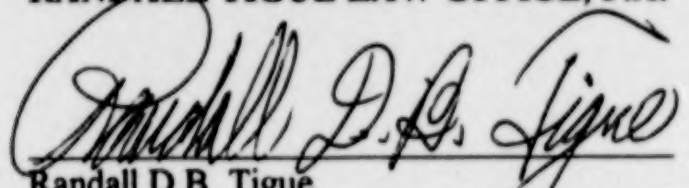

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PAPER ON THE "SECONDARY EFFECTS STUDIES" RELIED UPON BY GOVERNMENTAL BODIES WHEN ENACTING LEGISLATION TO REGULATE "ADULT" BUSINESSES

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYER'S ASSOCIATION

INTRODUCTION AND SUMMARY

In order to establish a sufficient basis for the zoning of "adult" entertainment businesses, governmental bodies rely upon the association of "secondary effects" to such facilities as justification for enacting such regulations. Among the most important potential effects considered by local governments have been increases in neighborhood crime rates and decreases in surrounding property values.

A number of cities, counties, and states have undertaken investigations intended to establish the presence of such secondary effects and their connection to adult facilities. These "secondary effects studies," as we shall call them, generally serve as the basis for claims that adult establishments engender harmful secondary problems. And, this Court has stated that a municipality need not conduct new studies of these effects before adopting laws designed to ameliorate the same, "so long as whatever evidence the City relies upon is believed to be relevant to the problem that the City addresses." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (emphasis added).

The "evidence" which most municipalities rely upon as justification for enacting regulations of adult businesses, rather than conducting their own studies or investigations, are these secondary effects studies. Succinctly put, many local governments across the United States have relied on this body of research (e.g., "studies" carried out by other municipalities) as evidence of the secondary effects of adult businesses. In most cases, cities and other governmental agencies have used the experiences of a limited number of other locales with adult businesses as a rationale for instituting regulation of such businesses in their own communities.

Since a core set of studies have been, and continue to be, relied upon by hundreds of local municipalities as evidence of negative secondary effects, a central concern must be the methodological rigor, and therefore trustworthiness, of these studies. In addition, the applicability of these studies in regard to the efficacy of any particular regulation must be evaluated as well. This is particularly true in that the precedent of this Court has established that a municipality must establish that such regulations are necessary to further the governmental interest of ameliorating secondary effects, and that such regulations are no broader than is essential to the furtherance of such interest. *Renton; United States v. O'Brien*, 391 U.S. 367, 377 (1968).

To aid this Court in evaluating the validity, and applicability to the case at hand, of the secondary effects studies cited by communities across the country, this paper will abstract and analyze the methodology and major empirical findings in the relevant research. As we will demonstrate, with few exceptions, the most frequently used studies are seriously and often fatally

methodologically flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry, and nearly universally fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses, or a reversal of the presumed negative effect.

ANALYSIS

I. Local Governments Attempting to Regulate Adult Businesses Rely on a Core Set of Frequently Cited Scientific Studies of Secondary Effects.

We have reviewed a large body of laws enacted for the regulation of adult entertainment businesses, and have amassed as many as possible of the empirical and non-empirical reports examining potential secondary effects of such businesses produced or purportedly relied upon by municipalities considering the issue. Often, the laws --usually municipal ordinances -- contain "preambles" that specifically set forth which of the various "secondary effects studies" the municipality is relying on as justification for enacting the particular regulation. Presumably, these studies are listed in order to comply with the *Renton* requirement that a municipality rely upon evidence "reasonably believed to be relevant to the problem that the City addresses." 475 U.S. at 51-52.

The ten most frequently cited reports in these preambles to the regulations that we have amassed, and a representative list

of some of the communities that have stated that they have relied upon them in enacting regulations of adult businesses, are set forth in Table 1. We made every effort to secure as many of these municipal reports as possible. These reports were originally obtained by contacting communities and municipalities known to have addressed the issue of government regulation of adult businesses. Although it is more than likely we have not included in our review every single "secondary effects study" that may exist, we have obtained a quite large and representative number of such reports. From our review of the literature, we are confident that we have collected and analyzed the vast majority of "studies" that communities purport to rely upon when enacting regulations of adult businesses.

For purposes of this paper, we consider in detail what we have found to be the four most frequently cited (and relied upon) studies of secondary effects: Indianapolis, IN (1984), Phoenix, AZ (1979), and Los Angeles, CA (1977), and St. Paul, MN (1978). It should be noted, however, that the problems that we have found in these four reports in regard to misunderstandings of their "findings" and methodological failings (which we discuss in detail below), pertain as well to the next six most frequently relied upon reports. We discuss these next six studies in brief at the end of this paper. Accordingly, the concerns that we outline below apply to all of the "top ten" relied upon "secondary effects studies." And, virtually all of the reports that we have analyzed have these same failings, often because they themselves relied upon earlier "studies" that contained the flaws discussed below.

II. The Basic Requirements for the Acceptance of Scientific Evidence -- Such as "Secondary Effects Studies" Produced by Indianapolis, Phoenix, Los Angeles, and St. Paul -- Have Been Prescribed by this Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Among These Requirements are the Calculation of an Error Rate and Adherence to Professional Standards.

In an attempt to prevent the proliferation in courtrooms of what Peter Huber has called "junk science," this Court in *Daubert*, in an opinion authored by Justice Blackmun, held that there are limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts. The Court opined that scientific knowledge must be grounded "in the methods and procedures of science" and must be based on more than "subjective belief or unsupported speculation." 509 U.S. at 590. Thus, the Court said, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." Id. In a footnote, the Court observes that "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity." 509 U.S. 590 n. 9. Offering "some general observations" as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony.

1. The "key question" is whether the theory or technique under scrutiny is testable, borrowing Karl Popper's notion of falsifiability.
2. Although publication was not an absolute essential, the Court noted that peer review and publication increased "the likelihood that substantive flaws in methodology will be detected."

3. Error rate.
4. Adherence to professional standards in using the technique in question.
5. And, finally, though not the sole or even the primary test, general acceptance could "have a bearing on the inquiry". 509 U.S. at 593-94.

While it may not be necessary to hold municipalities to each of these considerations when weighing the validity of evidence substantiating the existence of secondary effects in connection with adult businesses, at least two factors are indispensable. We presume that it is at least a testable proposition that secondary effects may exist, or else a study would not have been undertaken in the first place. We can further presume that a lengthy peer review and publication process may be unlikely due to urgency when communities tend to address these issues. In addition, the general acceptance requirement is held to have a bearing but is not an essential consideration. The third and fourth factors, however, the calculation of an error rate and adherence to professional standards in using techniques or procedures, need to be applied to these studies in order to ensure "evidentiary reliability." Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation.

In a scientific study, the error rate refers to the probability of accepting a result as true, when in fact it is false.

It is an indication of the reliability of a finding. An error rate is determined by first calculating an estimation of a population characteristic (a statistic) that summarizes the data that has been collected, and then asking how likely it is that that statistical value would be obtained by chance alone. The error rate is the degree of chance a scientist will allow. In the social sciences it is conventional to set the error rate at five percent or less (i.e., we will tolerate an error rate of 5 times out of 100 the results may be obtained by chance).

Unless certain assumptions are met, statistical tests cannot be applied to the data and an error rate cannot be calculated. Most important of these assumptions in regard to, for example, survey research, is that the units of analysis (e.g., survey respondents) are randomly selected from the population, or in regard to an experiment, that the units of analysis (e.g., subjects) are randomly assigned to experimental and control or comparison groups. The results of properly conducted experiments and surveys are always couched in terms of an error rate.

In many cases, especially in field research, it is not possible to randomly assign units of analysis to an experimental group and a control group. This is universally true of "secondary effects" studies (e.g., it is not possible to randomly assign adult businesses to some neighborhoods and hold other neighborhoods as controls). When this is the case, adherence to a set of professional standards that have been devised by scientists in a particular area of inquiry to insure methodological integrity and thus the validity of a study is all the more necessary. These standards vary somewhat depending on the

area of inquiry or social science discipline, but they are generally known as professional standards for conducting "quasi-experiments."

III. In Order to Calculate an Acceptable Error Rate and Adhere to Professional Standards, a Study Purporting to Measure Secondary Effects Must: A) Include a Control Area That is Equivalent to the Study Area; B) Include a Sufficient Period of Time Both Prior to and Following the Establishment of an Adult Entertainment Business in a Community to Ensure that the Study is not Detecting an Erratic Pattern of Activity; C) Measure the Crime Rate According to the Same Valid Source for Both Areas; and D) Properly Conduct Survey Research in Accordance With Professional Standards.

The following four criteria are crucial in insuring that a scientifically valid study of secondary effects has been conducted:

A. In order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the adult entertainment business(es). Since most studies of secondary effects attempt to uncover increases in crime or neighborhood economic deterioration, professional standards dictate that the control (non-adult) site must be comparable (matched) with the study (adult) site on variables related to crime and deterioration. Ideally, this matching should occur on neighborhood characteristics measured before the adult business has located in the study area. Of particular importance are that the study and control areas are matched for crime rate,

and ethnicity and socioeconomic status of individuals in both areas. Additionally, economic factors, such as median home value, and total individuals employed and unemployed, should be comparable in both areas. A concerted effort should also be made to include only comparison areas with similar real estate market characteristics including property values, rental rates, and proportion of unused commercial and industrial space in either area. The study and control areas should be approximately equal in total population. Finally, because of the effect of businesses that serve alcoholic beverages on increases in crime and neighborhood deterioration, the study and control area should be matched on the presence of alcohol serving establishments.

B. A sufficient period of elapsed time, both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic pattern of social activity. Most methodologically sound, quasi-experimental, time-series analyses rely on at least a one year period prior to and after the introduction of the event under study to test for significant changes. Generally, the longer the time period before and after the event under consideration, the more stable (and more valid) the estimates of the event's effects tend to be.

C. The crime rate must be measured according to the same valid source for all areas considered. Studies on secondary effects typically focus on two general types of crime in relation to adult entertainment businesses. These two types of crime are "general criminal activity" (including, but not limited to, robbery, theft, assault, disorderly conduct, and breaking and

entering) and "crimes of a sexual nature" (including, but not limited to, rape, prostitution, child molestation, and indecent public exposure). First, it is especially important that the measurement of these crimes is based on the same information source for both sites and throughout the entire study period. For example, if the study area measures crime by the number and type of calls made to the police department, the control area must also rely on such a measure when the two areas are compared.

In addition, the crime information source must be factually valid and reliable such as a daily log kept by police, or a compilation of the number of arrests. Many studies claim to measure area crime by asking survey respondents about their estimates of the likelihood of being a victim of crime. Such data is not preferred because of its subjectivity and, as such, cannot be trusted as a valid representation of actual criminal activity in a particular area. As social scientists, we would hesitate to rely upon such "evidence" to establish a causal link between adult businesses and secondary effects. From our review of *Daubert*, we believe such information may not have sufficient "trustworthiness" to be admissible in a federal court of law. However, if such subjective opinion research on crime is to be undertaken it must conform to the standards for conducting reliable and valid survey research (these standards are described in D immediately below).

Researchers must also acknowledge any change in police surveillance techniques once an adult entertainment business has been established in a particular community. Obviously, increased surveillance of an area simply because an adult

business is located there will have an impact on the amount of crime detected by the police. If increased police surveillance and the opening of an adult business in a particular area are confounded in this way, it is impossible to tell whether crime has increased due to the presence of the adult entertainment business or simply because of the increased police activity.

D. Finally, survey research, if relevant to the question at all, must be properly conducted. Most survey research in this area involves asking real estate professionals, local property owners, and/or law enforcement officers and community residents to estimate the effect of the presence of an adult entertainment business on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are also undertaken. While subjective surveys may provide us with a sense of the general opinion of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas. For instance, while the opinions of real estate professionals are legitimate and important, they have a particularly strong interest in the issue, and as such, may produce biased results.

Survey evidence is not comparable to, nor can it replace, the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled by the police within areas containing adult entertainment businesses, with property values or crime statistics within areas containing no such businesses. Such a comparative analysis is the preferable

social scientific means by which to establish a relationship between the presence of adult entertainment businesses and either decreases in property values or increases in crime for the surrounding areas.

In addition, even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. First, it is important to ensure that a random sample of potential respondents is included in the study. Second, a sufficient response rate must be reached (at least 70-75% should be returned according to many experts) and those who do respond must not be a biased sub-portion of the sample. Finally, there must be a sufficient number of respondents to provide a stable statistical estimate.

IV. Three Out of the Four Most Frequently Relied Upon Studies Purporting to Demonstrate Negative Secondary Effects -- Indianapolis, IN (1984), Phoenix, AZ (1979), and Los Angeles, CA (1977) -- are Invalid According to the *Daubert* Standard. More Importantly, the Fourth Study, St. Paul, MN (1978), Which was Conducted in the Most Methodologically Sound Manner, Shows No Negative Secondary Effects. Yet, Each of These "Studies" is Repeatedly Cited by Municipalities as Justification for Enacting Regulations that are Intended to Address These Supposed Secondary Effects Problems.

The four most frequently cited studies and the degree to which they are scientifically valid are summarized in Table 2. We describe each of the studies below, including their actual findings and conclusions as well as their methodological strengths and weaknesses, in reverse order of how often they are cited by municipalities.

A. St. Paul, Minnesota: Neighborhood deterioration and the location of adult entertainment establishments in St. Paul. (1978).

SUMMARY: This study represents the most methodologically sound of all of the empirical research we reviewed. Most importantly (and most interestingly given the number of cities that cite it as justification for passing regulations designed to combat secondary effects), this study does not claim to have found any support for the existence of a relationship between sexually oriented adult entertainment businesses and negative secondary effects.

This study was methodologically stronger than most others for at least two reasons. First, the researchers examined all 76 census tracts within the St Paul region. They compared all tracts containing adult entertainment establishments with all of those that did not. As such, the study examined the entire geographical "study universe," negating the need for random assignment of control areas or the appropriate matching of selected control areas to the study area. Second, the study, which compared levels of neighborhood deterioration for study and control areas, maintained a substantial time lag between the first measures of deterioration and the second. Deterioration

was determined by examining crime counts, housing values, and market and legal influences over the study period. Therefore, changes in neighborhood climate between the first and second measures are more likely representative of reliable neighborhood changes rather than erratic fluctuations in social activity.

The most important aspect of this study is that it found absolutely no relationship between sexually oriented businesses and neighborhood deterioration. In fact, the study found that the only factor that was predictive of neighborhood deterioration was whether an alcohol serving establishment was operating within the area. Interestingly, however, no relationship was found to exist between neighborhood deterioration and the presence of establishments that served alcoholic beverages and offered live nude entertainment. Reliance upon this study as justification for enacting regulations of adult businesses in order to curb secondary effects is therefore misplaced.

B. Los Angeles, California; Study of the effects of the concentration of adult entertainment establishments in the City of Los Angeles. (1977)

SUMMARY: This study is perhaps the most often incorrectly referenced of any empirical research investigating the effects of adult oriented businesses on surrounding areas. In fact, although it is the third most relied upon piece of research that we have found supposedly establishing the relationship between adult oriented businesses and negative social repercussions, the researchers actually never claim any significant support for such a connection. As with the St. Paul

study described above, reliance upon this study as justification for enacting regulations of adult businesses in order to curb secondary effects is therefore misplaced.

The study report consists of four parts.

1. In the first part of the study, the researchers openly admit that they found no evidence of a relationship between the operation of adult entertainment businesses and potential negative effects. These conclusions were based on the results of a comparison of the average property value changes for five study areas and four control areas. Each of the five study areas was chosen because it contained a known cluster of adult entertainment businesses. The four control areas were chosen because of their proximity and supposed similarity to at least one of the study areas, and because they did not have an adult entertainment business operating within their borders. All of the study and control areas were in Hollywood, Studio City, or North Hollywood.

The researchers reported that it was difficult to find any consistent increase or decrease in property values associated with adult businesses. Results of the comparisons found that while study and control areas "1" both decreased in average value, there was a far larger decrease in the control (non-adult) area. Such a result is contrary to the assumption underlying the secondary effects doctrine (that adult establishments themselves cause a decrease in property values). Similarly, study (adult) area "2" increased in value by more than 400% over its comparable control (non-adult) area. Again, this result is directly opposite to what one would expect to see by assuming

a connection between adult businesses and secondary effects. Given these objective findings, the researchers stated that there is "...insufficient evidence to support the contention that concentrations of sex oriented businesses have been the primary cause of these patterns of change in assessed valuations between 1970 and 1976." It seems that those who have incorrectly referenced this study as supporting the relationship between adult entertainment businesses and lower property rates have simply disregarded the preceding statement by the study's authors.

2. The second part of the Los Angeles study claims to have found that survey results suggest that public opinion is strongly opposed to the operation of adult businesses. Yet, such a "study" does nothing more than attempt to gauge subjective opinions, and does not then serve to answer the question of whether adult businesses actually cause secondary effects. In addition, even in this subjective endeavor, the researchers failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques--most importantly, they failed to obtain a random sample of respondents. Without adherence to the requirement that a random sample of respondents be obtained, the study authors cannot calculate an error rate and the reliability of the results cannot be determined. Instead, the authors are left with a non-random survey of the opinions of a potentially biased group of property owners and real estate professionals who lived and/or worked within 500 feet of an adult entertainment business. Such a "survey" offers no insight as to whether adult establishments engender secondary effects and is not even representative of the broader public opinion on the issue.

3. In the third part of the Los Angeles study, the researchers openly acknowledge that they found no significant differences in crime rates between the census tracts encompassing the areas containing adult entertainment businesses and areas containing no such establishments. This part of the study consisted of an examination of the crime and population statistics for each of the census tracts containing clusters of adult entertainment businesses. Only tracts containing the clusters of adult businesses considered within the study areas for the first part of the study (already discussed) were considered. These data were then compared to those obtained from the census tracts containing each of the comparison control (non-adult) areas used in the first part of the study. Both sets of data were analyzed and compared over time in order to determine any significant differences concerning crime rates. The study authors concluded that in general, there were no significant differences in crime rates between the census tracts encompassing the study (adult) and control (non-adult) areas, and that no firm conclusions relevant to the study could be developed.

4. The final part of the Los Angeles study involved a "special" police study of the areas of Hollywood containing clusters of adult entertainment businesses. However, the researchers failed to adhere to even the most basic and rudimentary professional standards by failing to attempt to make a comparison of crime statistics in these areas with those in comparable control (non-adult) areas. Most importantly, the researchers failed to compare the areas surrounding adult businesses with comparable control (non-adult) areas. In addition, the researchers admitted to a substantial change in

police surveillance of the area under study, which renders any results at least suspect, and most likely meaningless. Although the findings of this study suggested high levels of criminal activity within these clusters, any implication that this is connected to the presence of adult businesses is invalidated by the fact that the researchers admitted to "stepped up" surveillance within these areas. Put simply, the police most likely found greater amounts of crime in the adult establishment areas because they were trying harder to find it. These failings and problems take this portion of the study outside of the reliability criteria of *Daubert*.

C. Phoenix, Arizona; Relation of criminal activity and adult businesses. (1979)

SUMMARY: This report presents the findings of a study performed in the city of Phoenix, Arizona that attempted to examine the relationship between adult entertainment businesses and local crime rates. This study claimed to find higher overall crime rates in study areas containing adult oriented businesses compared to control areas containing no such businesses. However, the evidence of negative secondary effects was equivocal at best. In addition, the study fails to adhere to professional standards because the control sites are not sufficiently comparable with the study site, and there was not a sufficient period of time, both prior to and following the establishment of an adult entertainment business, for the collection of data necessary to ensure that the study is not merely detecting an erratic pattern of social activity.

The researchers selected three geographically diverse

study areas, each comprised of one census tract in which at least one adult entertainment business was in operation. They further selected three control (non-adult) tracts located directly adjacent to the study tract. An attempt was made match each of the three control areas with the study areas on several dimensions. These included: a) Number of buildings built since 1950; b) median family income; c) median population age; d) percentage of acreage used residentially; and e) percentage of population that was non-white. It is essential that the selected study and control areas be accurately matched. The matching of study and control census tracts for this study was unacceptable, however. The median income for study area 1 was 30% lower than that in the matching control; control area 1 had a substantially greater number of buildings built since 1950 than the corresponding study area; and study areas 2 and 3 each had significantly lower median income levels than did their matching control areas. Since income and crime levels are generally inversely related we might expect to see higher crime rates with lower income irrespective of the presence of adult businesses. These failures to sufficiently match the study and control areas suggest that this study does not adhere to acceptable professional standards for scientific research.

In addition, there was an insufficient period of time, both prior to and following the establishment of an adult entertainment business for reliable measures of crime or economic deterioration to be obtained. The study only looked at crime rates for a one year period. Because of the extremely short period of time, we cannot be sure that the study is not merely detecting an erratic pattern of social activity.

Finally, although the study findings suggested that overall crime rates were higher in each of the study areas than those for each matching control area, a composite index of "violent crimes," which included murder, robbery, assault, and rape, was also constructed. Each study (adult) area showed a lower rate of violent crime (including rape) than their matched control (non-adult) area. In addition, the rate of child molestation was higher in the control (non-adult) areas than in the matched study (adult) areas. The results of the study offer, then, equivocal evidence at best of the relationship between crime rates and the operation of adult entertainment businesses.

D. Indianapolis, Indiana; Adult Entertainment Businesses in Indianapolis: An Analysis. (1984)

SUMMARY: From our review, this study appears to be the report most widely cited by and relied upon by municipalities as evidence of negative secondary effects. Regardless of the problems with this report as outlined in this summary, the overall study offers equivocal findings regarding the supposed relationship between adult businesses and negative secondary effects. More importantly, in a sub-area analysis most relevant to the question of the relationship between adult businesses and secondary effects, lower rather than higher crime rates were found in all study (adult business) areas when compared to control (no adult business) areas. In addition, the overall study fails to adhere to rudimentary professional standards, and an error rate cannot be calculated due to a failure to meet basic statistical assumptions. The methodological problems with this study can be summarized as follows: a) The control sites are not sufficiently comparable (properly matched) with the study sites;

b) no measurements are taken prior to the establishment of an adult entertainment business to ensure that the study is not merely picking up an already established crime pattern that is independent of the adult business(es) in the area; and c) a potential confounding effect caused by adult entertainment businesses that supplied both sexually oriented entertainment and alcoholic beverages exists in the data. Finally, the researchers did not adhere to minimum professional standards by failing to conduct a survey study of real estate professionals in accordance with proper survey techniques. Beyond being purely subjective, the most striking limitations of this survey study is that it asks a national sample of real estate appraisers who are not from Indianapolis to consider only a hypothetical scenario concerning adult businesses in a community. Thus, the survey results are not applicable to the question of whether an adult business would have a negative effect upon property values in the Indianapolis area.

The Indianapolis study contains reports of four separate analyses. Each has significant methodological problems that undercut its reliability.

1. While the first set of analyses purport to show that higher crime rates were associated with adult entertainment businesses, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas and by not including a sufficient period of time prior to the establishment of an adult entertainment business for collection and analysis of data. In this portion of the report, the researchers compared crime rates for six study areas containing at least one adult entertainment business with crime rates for six

control areas containing no adult entertainment businesses. The study authors attempted, but failed, to properly match control and study areas on a number of criteria; including zoning mix, population size, and age of housing stock. For at least two of these criteria, an adequate study/control match was not obtained. First, significant differences existed in reference to the zoning mix within the majority of study versus control sites. Second, the control sites were 37% more heavily populated than the study sites. Since population density and zoning mix may be associated with higher crime rates, any differences found between the study and control areas may be due to this density or mix rather than the presence of adult businesses.

The Indianapolis study is methodologically sound in that it did allow for a sufficient period of time after the establishment of an adult business (four years) to determine if trends for crime and neighborhood deterioration were meaningful rather than erratic patterns of social activity. However, the study did not include a sufficient period of time prior to the establishment of an adult entertainment business for the collection and analysis of data. This lack of measurement in the time before the adult business located in the area makes it impossible to determine whether findings of higher or lower crime rates in either area are associated with the operation of adult entertainment businesses, or whether the study is simply detecting an already established pattern of crime activity. In fact, the crime rates for the study areas are substantially higher at the onset of the study than that of the control areas. However, in the absence of a measure taken prior to adult businesses locating within the study area, the study cannot determine whether this difference in crime rates was a function of the presence of adult entertainment

businesses being in the area, or if the owners of the adult business chose to locate in less expensive, higher crime areas.

More importantly, a significant difference between the study and control areas in increases in criminal activity was found for only one of the four years. The researchers based their conclusion that a significant difference in the increase in average crime rate for the study versus control areas on the data from this year only. Yet, aside from a one year increase in crime rate for the study area, the differences in crime rates between the study and control areas are essentially zero. Simply put, the data collected does not support the conclusion reached that adult businesses are associated with a significant increase in criminal activity.

Finally, also problematic is the fact that at least one establishment that served alcoholic beverages was included within each of the study areas, while this was not the case for each of the control areas. As several studies (see St. Paul above) have found evidence that the presence of alcohol serving establishments are associated with higher rates of criminal activity, this must be viewed as a potentially serious flaw (confound) to the study's validity. We would expect to see higher crime rates in areas that contained establishments that served alcoholic beverages, regardless of the presence or absence of any "adult" businesses.

2. The Indianapolis report included a sub-area analysis that found lower rather than higher crime rates in all areas where adult businesses were located compared to control (non-adult) areas.

This analysis involved a comparison of crime statistics for a smaller sub-area of the larger areas considered in the first study. The researchers examined crime rates in a 1000-foot radius around the adult businesses in the study areas. They compared these crime rates to those within a 1000-foot radius around a random centroid located within the control areas used in the first analysis. This portion of the study would then appear to be the most relevant of all to the question of whether adult businesses create or cause secondary effects in the areas immediately surrounding them.

Importantly, this sub-area analysis found lower crime rates in all study (adult) areas compared to control(non-adult) areas. Thus, when examining the relation of crime to adult entertainment businesses at a more direct and specific level, the evidence in the highly cited Indianapolis study establishes that adult entertainment businesses are related to lower rather than higher overall crime rates when compared to randomly chosen control (non-adult) areas.

3. The Indianapolis report authors claimed to have found a substantially smaller increase in property values for the study areas than the control areas. However, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas. This portion of the study is therefore unreliable from a scientific standpoint.

This analysis compared the average home mortgage value and average number of homes sold for the control and study areas discussed in the first study, as well as those for the center township area. Since the data came from the same study

and control areas discussed in the first analysis, it is fraught with the same methodological problems associated with that data set--the study and control areas were not properly matched. The average mortgage values in the study areas were initially 49% higher than those in either the control areas or the central township area. As such, the finding that the average mortgage value for the control areas and central township area increased by 77% and 56% respectively, while the study areas saw only an average increase of 26%, can be explained as the result of what is known as a ceiling effect. The study area values may have initially been far more inflated than the two comparison areas. Thus, it would come as no surprise that the study areas saw a smaller increase in property value than the comparison areas. The vast differences in initial mortgage values associated with the failure to properly match control and study areas rendered the two areas far too dissimilar to consider as suitable comparison groups for determining changes in mortgage values or home sale rates. Finally, it should also be noted that despite the greater increase in mortgage values for the control and center township areas in comparison to the study area, the study (adult) area still maintained a higher average mortgage value when the final measures were taken.

4. The fourth analysis reported in the Indianapolis report included the results of a national survey of real estate professionals of the American Institute of Real Estate Appraisers from around the United States. This form of data collection is flawed in three ways. First, survey research on perceived likely deterioration effects is completely subjective and does not answer the question as to whether there are secondary effects associated with adult establishments in terms

of actual property values; such as average home prices or other economic indicators. Second, even in this subjective analysis, the researchers failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques. Although a random sample of real estate professionals was obtained, the response rate was unacceptably low (only one third of the respondents returned the questionnaire). Further, no error rate was calculated for the percentages reported in the study. Without the calculation of an error rate the researchers cannot establish a "confidence interval" around the percentages calculated in the study. This is especially troublesome given the fact many of the findings hovered around the 50% mark. Without some indication of the confidence we can place in these estimates, we cannot be sure if a majority or a minority of real estate appraisers respondents projected a negative impact if adult businesses were to locate in a community.

Third, even more problematic, the appraisers were asked only to consider a brief hypothetical situation concerning a middle class family that lived in an area in which an adult bookstore would soon be opening in a nearby building. They were then asked to respond to five questions concerning the potential effects on the value of the family's home. A fatal flaw in this study is that it asks a nationally selected group of appraisers--none of whom were from indianapolis--to consider only a hypothetical scenario. Thus, it has little to say about how an Indianapolis community appraiser might actually view the value of a home in Indianapolis.

E. Summary of the six other most frequently

referenced reports.

SUMMARY: The remaining six most frequently referenced studies in descending order were reports produced by: Austin, TX (1986), St. Paul, MN (1987/1988), Amarillo, TX (1977), Detroit, MI (1972), Beaumont, TX (1982), and Kent, Washington (1982). Two of these, the reports by Beaumont, TX (1982) and Detroit, MI (1972), are not empirical studies. The Beaumont "study, " for example, is merely a report prepared by planning department of that municipality suggesting a need for regulation of adult businesses. The remaining four did not adhere to minimum professional standards of valid scientific research by failing to meet one or more of the four necessary criteria discussed in section III above.

The studies produced by Austin, TX (1986), St. Paul, MN (1987/1988), and Amarillo, TX (1977) all failed to compare neighborhood characteristics (crime rates or property values) for areas containing adult entertainment businesses with control areas containing no such businesses. In addition, studies produced by Austin, TX (1986), St. Paul, MN (1987/1988), and Amarillo, TX (1977) all failed to include measures of neighborhood characteristics over a sufficient period of time, both prior to and following the establishment of an adult entertainment business. Further, the Kent, WA (1982) study, which contained a report of an attempt to query neighbors of adult business establishments, failed to adhere to even the most minimal professional standards for proper survey research.

V. To Date, No Scientific Studies Have Specifically Examined Whether Precluding Full Nudity in "Adult

Cabarets" Ameliorates Adverse Secondary Effects.

The secondary effects studies referenced above were invariably conducted in regard to attempts to zone adult establishments in certain areas of a given municipality. In regard to the ordinance at issue here, reliance upon these studies, or even the concept of secondary effects, is scientifically insupportable for two reasons.

First, assuming that certain adult establishments do in fact engender secondary effects, we are aware of no studies that have evaluated the impact of zoning regulations on such effects. Simply put, zoning laws directed at adult businesses are enacted to reduce secondary effects. Assuming the existence of secondary effects connected to adult facilities, and assuming that zoning regulations will ameliorate the same (at least to some extent), the question must then be asked as to whether adult businesses still engender secondary effects once they are subject to zoning restrictions. We are aware of no studies which have been conducted that evaluate the level of any secondary effects that might remain in regard to adult establishments once they have been subjected to the restrictions of zoning regulations, in order to justify the enactment of further regulations of such businesses to address any argued remaining secondary effects.

Second, none of the studies that we have reviewed either analyze or even attempt to analyze whether an anti-nudity regulation is effective in reducing any secondary effects that are argued to be connected to adult businesses. In particular, with regard to the legal analysis of the constitutionality of the regulation enacted by the City of Erie, we are aware of no

studies that support the proposition that such an anti-nudity regulation is, in the context of the *Renton/O'Brien* test, necessary to further the governmental interest in ameliorating any secondary effects that may be attributed to adult businesses, or whether such a law is essential to the furtherance of that governmental interest.

CONCLUSION

In this paper we abstracted and analyzed the methodology and major empirical findings of studies purporting to detect secondary effects of adult businesses. We demonstrated, with few exceptions, the scientific validity of the most frequently used studies are seriously and often fatally methodologically flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry, and nearly all fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses, or a reversal of the presumed negative effect.

Respectfully submitted,

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Interpreting Socio-legal Research.
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Media Law.
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Introduction to Mass Media Effects.
Communication Law.
Advanced Mass Media Effects Research.

Graduate Seminars:
Research Methods in Communication.
Applications in Research Methods.
Policy Issues in Justice and the Mass Media.

**University of California, Los Angeles,
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Mass Media and Aggression Against Women.
Freedom of Communication: Mass Media and the Law.
The Effects of Mass Media.
Communication Theory.

HONORS AND AWARDS

1999 National Communication Association: Top Three Refereed Papers in Mass Communication Division. Paper Title: *Race and the Misrepresentation of Victimization on Local Television News.*

1992 International Communication Association: Top Three Refereed Papers in Communication Law and Policy. Paper Title: *Defining the limits of public tolerance for sexually explicit and sexually violent materials: A field experiment.*

1990-91 UCSB Plous Memorial Award. Presented to an Assistant professor in the College of Letters and Science "who has demonstrated outstanding performance by creative action or contribution to the intellectual life of the college community."

1990 International Communication Association. Top Ten Paper in Mass Communication. Paper Title: *Applying social science to film ratings: A shift from what is considered offensive to what is harmful to children.*

1986 Wisconsin Psychological Association Margaret Bernauer Psychology Research Award. Paper Title: *Individual differences in hostility and psychoticism, exposure to sexual violence in the media and reactions to a rape victim.*

1985 First prize: American Psychological Association Division 41 (American Psychology-Law Society, AP-LS) Dissertation Award. Title: *Sexual Violence in the Media: Effects on Male Viewers and Implications for Society*

1985 First prize: American Psychological Association Division 9 (Society for the Psychological Study of Social Issues, SPSSI) Dissertation Award.Title: *Sexual Violence in the Media: Effects on Male Viewers and Implications for Society*

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PROFESSIONAL ACTIVITIES

Research Grants (submitted)

Linz, D. *Identifying barriers to victim reports od sexual assault to the police and developing a mass media campaign to increase reporting.* Submitted to the National Institute of Justice. $196,541 (10/1/98-3/31/00).

Research Grants (funded)

Wilson, B., Linz D., & E. Donnerstein. *Evaluation of the "Choices and Consequences" Initiative*. Court TV. $120,635 (6/98-6/99).

Donnerstein, E., Wilson. B., Kunkel, D. & D. Linz. *National television violence study*. National Cable Television Association. $3,326,449 (6/94-1/98).

Malamuth, N., & Linz, D. *Predicting Sexual Coercion and Antisocial Behavior Against Women*. ($414,284, National Institute of Mental Health, 06/01/89-5/31/91).

Linz, D. *Pretrial exposure to mass media and legal decision-making*. ($41,804, National Science Foundation, 7/1/88-10/1/89).

Malamuth, N. & Linz, D. *Predicting sexual coercion and antisocial behaviors against women: An eight year follow-up*. ($2000, Small Research Grant Program, UCLA Center for the Study of Women, 1/1/88-10/1/88).

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PROFESSIONAL SERVICE

Consulting Editor

1991-93 *Journal of Research in Personality*, Academic Press.

Journal Refereeing

1989-pres. *Human Communication Research*
1988-pres. *Journal of Personality and Social Psychology*
1987--pres. *Journal of Communication*
1989-pres. *Communication Research*
1986-pres. *Journal of Research in Personality*
1988-pres. *Journal of Sex Research*
1987-pres. *Journal of Experimental Psychology*
1988-pres. *Law and Human Behavior*
1990-pres. *Journal of Broadcasting and Electronic Media*

1990-pres. *Law and Society Review*

Professional Memberships

International Communication Association (ICA)
Law and Society Association
American Psychology-Law Society (APA Division 41)
Society for the Psychological Study of Social Issues (APA Division 9)

UNIVERSITY AND PUBLIC SERVICE

Communication Department

1991-2 Graduate Advisor/ Chair-Graduate Committee
1990-4. Member Graduate Committee

Graduate Students Supervised (Directed*/Committee Member)

Ilene Arluk	M.A.*	1988		
Cynthia Felando	M.A.	1989		
Barbara Randall M.A. 1989				
Diana Stroyls	M.A.*	1990		
Audrey Weiss	M.A.	1990	Ph.D.	1994
Britt Andreata	M.A.*	1991		
Susan Fox	M.A.	1991	Ph.D.	1994
Wangner Diaz	M.A.	1991		
James Harwood	M.A.	1992	Ph.D.	1994

Jay Eskenazi	M.A.*	1992			
Dorothy Imrich	M.A.*	1992	Ph.D.*		1998
Laura Jansma	M.A.*	1992	Ph.D.	1996	
Charles Mullin	M.A.*	1992	Ph.D.*		1996
Laura Leets		M.A. 1992	Ph.D.	1995	
Denise Filotas	M.A.	1993			
Amy Tendrich	M.A.	1993			
Xixia Han	M.A.	1993			
Travis Dixon	M.A.*	1994	Ph.D.*		1998
Timothy Gray	M.A.	1996			
Sunwolf	M.A.	1997	Ph.D.	In Prog.	
Eva Blumenthal	M.A.*	In prog.			
Stacey Smith			Ph.D.	1999	
Carolyn Shepard			Ph.D.	In prog.	
Joan O'Connor			Ph.D.	In prog.	
Laura Zwarun			Ph.D.	In prog.	
Carrie Colvin	M.A.	1999			
Bryant Paul			Ph.D.*	In prog.	

Academic Senate

Member: Human Subjects Review Board, 1990-pres.

Community Service

Public Testimony/Governmental and Technical Reports

Wilson, B.J., Kunkel, D., Linz, D., Potter, W.J., Donnerstein, E., Smith, S.L., Blumenthal, E.Y., & Colvin (1997). Implications of the National Television Violence Study's content-based findings for evaluating the industry's V-chip ratings. Report to the Federal Communications Commission (CS Docket 97-55).

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Linz, D. (1991). *Obscenity law and social science measurement of community standards.* Presentation , Santa Barbara Women Lawyers, Santa Barbara, CA.

Donnerstein E. & Linz, D. (1990). *Evidence on the Causal Connection Between Exposure to Penthouse Magazine and Anti-social Conduct.* Testimony before the Indecent Publications Tribunal, Wellington, New Zealand.

Linz, D. (1990). *The effects of sexual violence in the mass media.* Testimony before the Senate Judiciary Committee on California Senate Joint Resolution No. 65--"Relative to television violence".

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Linz, D. (1984, February). *Civil litigation and victims of violent pornography*. Symposium on Media Violence and Pornography, Toronto, Canada.

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Linz, D. (1982, April). *Applying psychological research to the courtroom*. State Bar of Wisconsin Annual Meeting, Madison, WI.

PERSONAL REFERENCES

Dr. Edward Donnerstein, Dean, Division of Social Sciences
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Los Angeles, CA 90026

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University of Nebraska
Lincoln, NE 68588

Table 1 (cont.)
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

- St. Paul (1994)

Los Angeles, CA (1977) con't.
- St. Croix, (1993)
- Brooklyn Park, MN

4. St. Paul, MN (1978)
- Dallas (1986)
- Ramsey (1990)
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Minnesota (1989)
- Bellevue (1987)
- Brooklyn, MN
- Falcon Heights (1994)
- Brooklyn Park, MN
- Manatee County, FL
- Lynnwood (1989)
- Rochester/Olmsted (1988)

5. Austin, TX (1986)
- Dallas (1986)
- The Bronx (1995)
- Manchester, NH
- Broward County, FL
- Kansas City, MO (1998)
- Manatee County, FL
- Manhattan (1994)
- Seattle (1989)
- St. Cloud, MN
- St. Paul (1994)

6. St. Paul, MN (1987/1988)
- Brooklyn, MN
- Times Square, NY (1993)
- Minnesota (1989)
- Kansas City, MO (1998)
- Falcon Heights (1994)
- Fridley, MN
- Rochester/Olmsted (1988)
- St. Cloud, MN
- St. Paul (1994)

7. Amarillo, TX (1977)
- Dallas (1986)
- Beaumont (1982)
- Newport News (1996)
- Manatee County, FL
- New Hanover County (1989)
- St. Croix (1993)
- St. Paul (1994)

Table 1
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

1. Indianapolis, IN (1984)
- Dallas (1986)
- The Bronx (1995)
- Ramsey (1990)
- Manchester, NH
- Brooklyn, MN
- Beaumont (1982)
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Newport News (1996)
- Kansas City, MO (1998)
- Falcon Heights (1994)
- Fridley, MN
- Brooklyn Park, MN
- Manatee County, FL
- Lynnwood (1990)
- Oklahoma City (1986)
- New Hanover County (1989)
- Rochester/Olmsted (1988)
- Seattle (1989)
- St. Cloud, MN
- St. Croix (1993)
- St. Paul (1994)

2. Phoenix, AZ (1979)
- Dallas (1986)
- The Bronx (1995)
- St. Paul (1994)
- Ramsey (1990)
- Manchester, NH
- Brooklyn, MN
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Newport News (1996)
- Minnesota (1989)
- Kansas City, Missouri (1998)
- Falcon Heights (1994)
- Fridley, MN
- Brooklyn Park, MN
- Manatee County, FL
- New Hanover County (1989)
- Rochester/Olmsted (1988)
- St. Cloud, MN

3. Los Angeles, CA (1977)
- Dallas (1986)
- The Bronx (1995)
- Broward County, FL
- Times Square, NY (1993)
- Newport News (1996)
- Garden Grove (1991)
- Bellevue (1987)
- Manatee County, FL
- Lynnwood (1990)
- Manhattan (1994)
- Seattle (1989)
- St. Cloud, MN

Table 2

Top Four Referenced Studies and the Criteria for Insuring Scientifically Valid Research

Criteria	(A) Well Matched Control	(B) Sufficient Measurement Time	(C) Valid Crime Measure	(D) Correct Survey Methodology	**Evidence of Secondary Effects**
Study					
Indianapolis (1984)	**invalid**	**invalid**	valid	**invalid**	**Equivocal**
Phoenix (1979)	**invalid**	**invalid**	valid	--	**Equivocal**
Los Angeles (1977)	valid	valid	valid	**invalid**	**None**
St. Paul (1978)	valid	valid	valid	--	**None**

Table 1 (cont.)
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

8. Detroit, MI (1972)
- Beaumont (1982)
- Times Square, NY (1993)
- Bellevue (1987)
- (1989)
- Seattle (1989)
- St. Croix (1993)

Detroit, MI (1972) con't.
- New Hanover County

9. Beaumont, TX (1982)
- Dallas (1986)
- Newport News (1996)
- Manatee County, FL
- New Hanover County (1989)
- St. Croix (1993)

10. Kent, WA (1982)
- Des Moines, WA
- Bellevue (1987)
- Fife (1987)
- Lynnwood (1990)
- Seattle (1989)

FULTON COUNTY POLICE

Study Of Calls For Service To Adult Entertainment Establishments which Serve Alcoholic Beverages
January 1995 - May 1997

[Excerpts]

Prepared by: Cpt. Ron Fuller
Lt. Sue Miller
Date: June 13, 1997

RESOLUTION RELATING TO REGULATION OF ALCOHOL CONSUMPTION IN ADULT ENTERTAINMENT ESTABLISHMENTS

WHEREAS, the Board of Commissioners of Fulton County has reason to believe that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of such adult entertainment establishments; and

WHEREAS, the Board of Commissioners of Fulton County further has reason to believe that adult entertainment establishments which serve alcoholic beverages may have a negative impact on surrounding real property values; and

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities "... for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages..."; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of Goldrush II et al. v. City of Marietta et al.: Varsalona's Italian Restaurant d/b/a Bloomers et al. v City of Marietta. et al.: and Tudor d/b/a Cyprus Lounge v. City of Marietta et al. upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Georgia Supreme Court, in Chambers v. Peach County 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the

ordinance; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is consumed; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department and the Department of Planning and Economic Development, in consultation with the County Attorney, assemble any studies available which identify and document negative secondary effects related to the serving and consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Board of Commissioners further desires that the County Attorney prepare proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to alcoholic beverage licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which will be consistent with the above-cited March 17, 1997, ruling of the Georgia Supreme Court, and with the constitutional, statutory, and decisional law of the State of Georgia and the United States; and

WHEREAS, it is the intent of the Board of Commissioners to enact, if warranted by the said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and the consumption of alcoholic beverages at adult entertainment establishments; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression

protected by the United States or Georgia Constitutions, nor is it the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed;

NOW, THEREFORE, BE IT RESOLVED that the Fulton County Police Department is hereby directed to prepare within forty-five days hereof a study concerning calls for police assistance to, and crimes occurring at, areas wherein adult entertainment establishments which serve alcoholic beverages are located;

BE IT FURTHER RESOLVED that the Fulton County Police Department and the Planning and Economic Development Department, in consultation with the County Attorney, are hereby directed to assemble within forty-five days any studies available which document the negative secondary effects of the serving and consumption of alcohol in adult entertainment establishments;

BE IT FURTHER RESOLVED that the County Attorney is hereby directed to prepare within sixty days proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to liquor licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which are consistent with the March 17, 1997, opinion of the Georgia Supreme Court, and consistent with the constitutional, statutory, and decisional law of the State of Georgia and the United States;

PASSED AND ADOPTED this sixteenth day of

April, 1997.

BOARD OF
COMMISSIONERS OF
FULTON COUNTY,
GEORGIA

By:_____
Mitch J. Skandalakis, Chairman

By:_____
Commissioner Gordon L. Joyner
District 2

ATTEST:

_____
Clerk to the Board

APPROVED AS TO FORM AND LEGALITY:

_____
County Attorney

Table Of Contents

Section 1: Introduction to the study

Section 2: Overview of total number of calls and reports received by Fulton County Police

Section 3: Calls for Service: Charts & computer print outs for the following locations:
5600 Roswell Road, (Frankies)
5495 Old National Hwy. (Crowes Nest)
5840 Roswell Road, (American Pie)
5841 Roswell Road, (Good 'Ole' Days)
6300 Powers Ferry Road, (Mardi Gras)
4401 Fulton Industrial Blvd., (Riley's)
5343 Old National Hwy. (Club Legend)
304 Fulton Industrial Circle, (Babes/Fannies)
6420 Roswell Road, (Flashers)
5825 Roswell Road, (Cabo Wabo)
6071 Old National Hwy, (Club Twenty Grand)
5275 Roswell Road, (Coronet Club)

Section 4: Reports Taken: Charts & computer print outs for the locations and a sampling of reports from Adult Entertainment Establishments for 1996

Section 5: Conclusions

Brief Summary of
Goldrush II, et al. v. City of Marietta, et al. Varsalona's Italian Restaurant d/b/a Boomer's et a).. v. City of Marietta, et al., and Tudor d/b/a Cyprus Lounge v. City of Marietta, et al.

1. Amendment to Georgia Constitution provides that counties and municipalities shall have authority ".... or the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages..." [Article III, Section VI, Paragraph VII, Georgia Constitution.]

2. In January, 1995, the City of Marietta amended its adult entertainment license ordinance to prohibit the serving, selling, distributing or consumption or possession of liquor in adult entertainment establishments.

3. The prohibition ultimately was intended to extend to existing adult entertainment establishments serving alcohol.

4. The Georgia Supreme Court upheld the Marietta ordinance on March 17, 1997, and approved the Marietta ordinance's application to already existing businesses.

5. The Georgia Supreme Court, citing Chambers v. Peach County, 266 Ga. 318 (1996), reiterated that a legislative body must have appropriate studies before it documenting the

"negative secondary effects" such as crime, diminishing property values, and increased urban blight) before legislating any regulation of such negative secondary effects.

Introduction

On April 16, 1987, a Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments was passed and adopted.

This resolution directed the Fulton County Police Department to prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is sold and consumed. This was based on the reasonable belief that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of these establishments.

The statistical information included in this study was obtained through the Fulton County Police Departments computerized incident and calls for service reporting program.

Each call for police assistance, if taken over 911 enhance, is captured by a communication assisted dispatch (CAD) system. This information is available on every address in Unincorporated Fulton County where the police department is dispatched.

Each report that is generated from a police call for service is identified with a departmental case number that is unique to that reported incident. (It should be noted that a police report is generated for every call for service, and that officer initiated calls are captured on the CAD system).

The time period covered by this study is for January 1, 1995 through May 31, 1997.

There are twelve (12) establishments included in this study. Six (6) are adult entertainment establishments that serve alcoholic beverages. The others are those establishments that serve alcoholic beverages with no adult

entertainment.

Several of the locations Frankie's, Crow's Nest, Mardi Gras, Riley's, Babes, Fannies and Club Twenty Grand have addresses that are common to other businesses on the same property For this reason, the number of police calls for service to these locations cannot be attributed solely to the specific business that serves alcoholic beverages.

Statements of Fact

The following data has been based on several known facts They are as follows:

From January 1, 1995, to May 31, 1997 the Fulton County Police Department responded to 199,324 calls for service North and 152,002 calls for service South The total calls for service being 351.326.

From January 1, 1995, to May 31, 1997 the Fulton County Police Department made 34,680 incident reports North and 29,060 incident reports South The total number of incident reports taken being 63,740.

From January 1, 1995, to May 31, 1997 there were no Murders or Kidnappings reported at any of the establishments listed in this study There were 2 Rapes, 11 Robberies and 10 Aggravated Assaults reported in the establishments that served alcoholic beverages but do not have adult entertainment There was 1 Rape, 16 Robberies and 5 Aggravated Assaults reported in the adult entertainment establishments that serve alcoholic beverages.

Conclusions

From January 1, 1995, to May 31, 1997 the Fulton County Police Department responded to 728 calls for service to incidents reported at or in the vicinity of adult entertainment establishments that serve alcoholic beverages in this study During the same time period the police department responded to 1718 calls for service to establishments in this study that serve alcoholic beverages but do not provide adult entertainment.

Conclusion: There were 990 more calls for service to the establishments that did not provide adult entertainment.

The total number of calls for service to establishments in this study totaled 2446 Of those, 259 were alcohol related by call sign only Signal 28 Public Drunkenness, Signal 29 Drunk and Disorder/Tight, Signal 30 Driving Under the Influence, and Signal 38 Illegal Alcohol/Drugs 178 of these calls were to non-adult entertainment establishments that serve alcohol 81 were to adult entertainment establishments that serve alcohol.

Conclusion: There were 97 more alcohol related calls for service to those establishments that did not provide adult entertainment.

Based on this statistical study of calls for service and reported crime at adult entertainment establishments, there is no statistical correlation that shows that there is an increase in crime at adult entertainment establishments that serve alcoholic beverages However, there is a statistical correlation that would indicate that there is greater instances of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages.

There is nothing in the statistics of this study that would indicate why there is such a discrepancy in the calls to service and reported crimes in these types of establishments.

LOCI OF PROSTITUTION

- "Crossing the Line?, *Dateline NBC*, June 1, 1998 – sexual harassment at a Ford Motor Company plant, including a raffle for the services of a prostitute.
- "Officer Punished for Sex with Prostitute", *St. Petersburg Times*, January 23, 1999; "Officers Disciplined for Sex with Prostitute", *Tampa Tribune*, January 22, 1999 – St. Petersburg police officers found having sex with prostitute in various places, including police cruiser, convenience store, motel and school parking lot.
- "The Best Little Whorehouse in Jersey", *Time*, August 24, 1999; "The Lure of the Art of a Suburban Bordello", *New York Times*, December 6, 1998 – upscale neighborhood home is brothel.
- "Clearwater Renews Idea of Buying Atrium", *St. Petersburg Times*, August 29, 1997 – City contemplates purchase of prostitution hangout.
- "Police Say Motels Prostitution Haven", *St. Petersburg Times*, December 25, 1997; "Police Round Up 4 Motel Managers", *Tampa Tribune*,.December 25, 1997 – four motel managers arrested and charged with renting rooms to prostitutes.
- "Prostitution Fight May Target Cars", *St. Petersburg Times*, October 14, 1998 – City Council considers car forfeiture ordinance to deter prostitution in and near residential areas.
- "Officer Accused of Visiting Brothel During Bike Patrol", *New York Times*, June 4, 1999; "NY Cops Arrested in Brothel Scandal", *New York Times*, April 27, 1999 – New York City police officers patronize brothels while on duty.

- "Police Take Steps to Squelch Prostitution", *St. Petersburg Times*, January 2, 1999 – police actions target prostitution in redevelopment area.
- "Motel Can Reopen Pending Decision of Nuisance Board", *Tampa Tribune*, February 3, 1999 – motel used by prostitutes ordered to be allowed to reopen while Nuisance Abatement Board reviews case.
- "Clearwater Prostitute Sting Nets 17 Arrests", *St. Petersburg Times*, March 19, 1997 – sting and reverse sting aimed at cleaning up prostitute stroll.
- "Aide to Lyons Accused of Soliciting Prostitute", *St. Petersburg Times*, October 10, 1997 – aide to head of National Baptist Convention (now a convicted felon), charged with soliciting prostitute.
- "Sex Ring's Client List Might Be Released", *Detroit Free Press*, December 7, 1998 – prostitution ring operating out of upscale suburban home has list of 20,000 customers.
- "Escort Service Raid Yields Sexual Predator", *Tampa Tribune*, July 9, 1999; "5 Accused of Running Prostitution Business", *St. Petersburg Times*, July 9, 1999 – prostitutes operating out of residence.
- "Internet Site Advertises Local Prostitutes", *Sarasota Herald Tribune*, July 9, 1999 – prostitutes indicate their availability at ice cream stand, gas station and entrance to (graduate) design school.
- "New Zone May Only Relocate Crime", *Sarasota Herald Tribune*, undated – exclusion area for prostitutes established.
- "Prostitution Sting Results in 21 Arrests", *St. Petersburg Times*, August 1, 1999 – Police sting operation results in arrests along prostitution stroll; away from Adult Uses.
- "Priest Facing Charge in Solicitation Sting"; *St.*

- *Petersburg Times*, August 28, 1999 – Greek Orthodox Priest arrested in prostitution stroll sting.
- "Drug Bust Nets Pinellas Politician", *St. Petersburg Times*, December 22, 1996; "Tyndall Presents Two Sides to World", *St. Petersburg Times*, January 12, 1997; "Tyndall No Stranger to Cocaine Couple Says", *St. Petersburg Times*, January 8, 1997 – member of Board of County Commissioners caught with drugs. (He was also accused of using prostitutes. Ironically, the upscale, beach front resort hotel where the arrest occurred was Jimmy Bakker's {then leader of the *Praise the Lord* ministry} trysting place.)
- "Dealers, Prostitutes Lose Favorite Corners", *Tampa Tribune*, February 12, 1999 – exclusion zones, (nowhere any of the region's Adult Uses), established to keep out convicted drug dealers and prostitutes.
- "Tampa Police Polishing Strip", *Tampa Tribune* October 27, 1996 – prostitution and drug activity target in area.
- "Official Asks Police for Report on Crime at Park", *St. Petersburg Times*, July 16, 1999 – removing law enforcement duties from park rangers leads to drug use and prostitution at park.

AMROSE, FRIEDMAN AND WEICHLER
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August 11, 1999

Randall Tigue, Esquire
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2940 Pillsbury Avenue South
Minneapolis, MN 55408

Re: ***City of Erie v. Pap's A.M.***
Supreme Court No. 98-1161

Dear Mr. Tigue:

Please be advised that Pap's A.M. consents to your filing an Amicus Brief in this case.

Very truly yours,

AMBROSE, FRIEDMAN and WEICHLER

By: /s/ Philip B. Friedman
Philip B. Friedman, Esquire

PBF/dlb

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September 2, 1999

Mr. Gregory Karle
Attorney at Law
City Solicitor's Office
626 State Street
Room 505
Erie, PA 16501

RE: City of Erie, et al v. Pap's A.M.
Court File No. 98-1161

Dear Mr. Karle:

In previous correspondence, I have requested the consent of your office to the filing of an amicus curie brief on behalf of the First Amendment Lawyers Association. I made a similar request to Philip Friedman, attorney for respondent.

Mr. Friedman advised me that you and he had reached an agreement to consent to all amicus requests. He also copied me on a letter to you requesting your consent to FALA filing an amicus brief.

I have yet to hear from you in response, and amicus briefs in support of respondent are due on September 30, 1999. Please let me hear from you. If I do not hear from you within the next seven days, I will assume that the city objects to our requests and include a motion for leave to file instanter as part of our amicus brief.

Yours truly,

I, Gregory A. Karle, Esquire, counsel of record in the above-captioned case, have no objection to FALA filing an amicus brief to the United States Supreme Court.

Randall D.B. Tigue
Attorney at Law

By: /s/ Gregory A. Karle
Gregory A. Karle, Esq.
City Solicitor

RDBT/mh
cc: Philip Friedman